No. 92-1436 (3)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1992

TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY, CHARLES J. SCHAFFER, JR.,
Petitioners,

v.

FUQUA INDUSTRIES, INC.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should exercise its discretionary jurisdiction to review by writ of certiorari the constitutionality of 29 U.S.C. § 1401(a)(3)(A) in an action in which the arbitrator below found that petitioners presented no evidence that respondent intended to evade or avoid withdrawal liability in violation of 29 U.S.C. § 1392(c) when it spun off a subsidiary more than 4 years before that corporation allegedly incurred any withdrawal liability?

RULE 29.1 LISTING

Respondent Fuqua Industries, Inc. does not have a parent company. Its subsidiary (other than wholly owned subsidiaries) is Qualex, Inc.

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BRIEF IN OPPOSITION

The respondent Fuqua Industries, Inc. ("Fuqua") respectfully requests that this Court deny the petition for writ of certiorari filed by petitioners Teamsters Pension Trust Fund of Philadelphia and Vicinity and Charles J. Schaffer, Jr. (the "Fund"), seeking review of the judgment of the United States Court of Appeals for the Third Circuit entered in this case.

STATEMENT OF THE CASE

In 1968, Fuqua, a publicly held, diversified corporation, acquired Interstate Motor Freight System, Inc. ("Interstate"), a common carrier providing trucking services. Fuqua held Interstate as a wholly owned subsidiary from September 1968 until November 1, 1980.

In 1978, when initial talk began of impending deregulation of the trucking industry, Fuqua's management first considered

whether it should continue in the trucking business. At that time, however, the deregulation proposals were sufficiently vague that Fuqua decided not to pursue a divestiture of Interstate.

Two years later, in 1980, when trucking deregulation was imminent and Interstate was beginning to suffer the effects of a recession in the Midwest and within the automotive industry, Fuqua's management intensified its consideration of its relationship with Interstate.

On July 1, 1980, while Fuqua was considering strategic options for Interstate, deregulation became law with Congress's passage of the Motor Carrier Act of 1980, which effectively deregulated the trucking industry by lowering or removing barriers that had previously limited truckers from carrying certain freight, charging certain prices and using certain routes. With the trucking industry now facing a period of uncertainty, Fuqua's management felt that Interstate was a drag on the value of its securities and that its shareholders would benefit if Interstate were separated from Fuqua.

Throughout the summer of 1980, Fuqua's management considered alternative mechanisms for divesting Interstate. Several Fuqua executives drafted memoranda concerning the relative advantages of an Interstate spinoff, including the legal, financial and tax implications. Not a single one of these memoranda raised the issue of withdrawal liability.

A further effect of deregulation that was of pressing concern to Fuqua's management was the imminent passage of a Financial Accounting Standards Board ruling requiring companies with motor carrier operating rights on their books to write off those rights (the "FASB Ruling"). Because of the FASB Ruling, Fuqua would have had to take a charge against earnings of over $18 million, resulting in a 25% reduction in Fuqua's earnings for 1980 and a significant decrease in the value of Fuqua's stock, if Fuqua had not divested Interstate by December 31, 1980.

At a meeting held on September 29, 1980, Fuqua's management presented the spinoff proposal to its Board of

Directors. The Board was concerned, *inter alia*, that if Fuqua remained in the trucking business in a deregulated environment, the strategic decisions facing Interstate would require a disproportionate amount of management attention and that the changes brought about by deregulation would require Fuqua to make a long term commitment to restructure Interstate with a considerable capital outlay inconsistent with Fuqua's business strategy.

After consideration of the spinoff proposal, the Board authorized and directed a distribution of Interstate common shares to Fuqua common shareholders of record at the close of business on October 31, 1980. The distribution, at a rate of one Interstate share for each four shares of Fuqua held, occurred on November 1, 1980, at which time Interstate became an independent publicly held corporation.

While there was initially optimism in 1980 and 1981 about Interstate's ability to compete in the new deregulated environment, the economy worsened in late 1982. However, Interstate continued to operate through 1983 and 1984 until, as a result of the economy's continued downward spiral, on December 11, 1984, more than four years after the spinoff, Interstate ceased operations, entered in Chapter 7 Bankruptcy, and allegedly withdrew from the Fund. From the time of the spinoff in November 1980 until Interstate ceased operations in December 1984, it made uninterrupted contributions to the Fund, as had Fuqua during the twelve years it owned Interstate.

On March 15, 1985, the Fund filed a Proof of Claim in the Bankruptcy Court against Fuqua and Interstate for payment of withdrawal liability pursuant to the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. §§ 1381 and 1399, asserting that Interstate's cessation of operations constituted a statutory withdrawal from the Fund. Fuqua responded that it was not part of a group of trades or businesses under common control with Interstate, and requested that the Fund review its assessment against Fuqua. The Fund continued to claim that Fuqua incurred MPPAA withdrawal liability and commenced an action in the United States District Court for the Western District

of Michigan on July 3, 1985 for, *inter alia*, recovery of the withdrawal liability on two principal theories: (1) common control; and (2) evasion or avoidance of withdrawal liability. The district court granted summary judgment in favor of Fuqua on the first theory -- which was affirmed by the United States Court of Appeals for the Sixth Circuit -- and ordered arbitration under MPPAA of the "evade or avoid" claim.

On November 13, 1987, Fuqua, pursuant to the court's Order, filed a notice of intention to arbitrate the "evade or avoid" issue with the Philadelphia office of the American Arbitration Association.

After meeting with the Arbitrator, the Fund and Fuqua agreed that the Arbitrator would first address the question of the burden and standard of proof applicable to the substantive arbitration proceeding before he considered the ultimate issue of whether a principal purpose of Fuqua's spinoff of Interstate was to evade or avoid MPPAA withdrawal liability. With regard to the threshold burden of proof issue, the Arbitrator's carefully reasoned decision of October 10, 1988 concluded correctly under applicable Third Circuit law that the Fund bore the ultimate burden of persuasion that Fuqua intended to evade or avoid withdrawal liability. *See United Retail & Wholesale Employees v. Yahn & McDonnell, Inc.*, 787 F.2d 128 (3d Cir. 1986), *aff'd per curiam by an equally divided Court sub nom., Pension Benefit Guaranty Corp. v. Yahn & McDonnell, Inc.*, 481 U.S. 735 (1987) ("*Yahn & McDonnell*"). The Arbitrator, however, went further and expressly provided that,

> both parties in reality bear the burden of producing evidence to support their versions of the facts at issue. The critical burden referred to herein is that which both parties have to persuade the arbitrator concerning the ultimate truth of the facts at issue.

(page 79a).[1]

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[1] All citations are to the Petition or the Appendix to the Petition.

After allowing briefing on various evidentiary disputes, the Arbitrator held four hearings on the merits of the Fund's claim. The Fund's case-in-chief consisted of two expert witnesses, neither of whom had any first-hand knowledge of the facts in issue, and eight volumes of documents. Fuqua, in contrast, offered the testimony of two Fuqua executives who, as Board members at the time of the spinoff, were directly and personally involved with the planning of that transaction, and an expert economist, as well as the deposition testimony of three former Fuqua executives, each of whom was also directly and personally involved in the spinoff decision.

On October 1, 1990, in a thorough fifty page decision, the Arbitrator rendered his Award and Findings of Fact. The Arbitrator found that: "The record is devoid of either substantive or inferential evidence that 'a principal purpose [of the Interstate spinoff] was to evade or avoid withdrawal liability.'"[2] (page 59a).

On October 26, 1990, the Fund commenced this action in the United States District Court for the Eastern District of Pennsylvania (the "District Court") for an Order vacating the Award in favor of Fuqua. On March 31, 1992, Chief Judge Bechtle, in enforcing the Award, held:

> [T]he Arbitrator considered diligently and weighed all the evidence presented and did not err as a matter of law in

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[2] Fuqua notes that although the Fund has presented in its second of two "Questions Presented" the issue whether the Arbitrator correctly ruled on certain evidentiary matters, *e.g.*, whether the fact that a witness subject to subpoena by the Fund did not testify on behalf of Fuqua at the hearing supports the Fund's substantive theory of liability, the consequences of Fuqua's non-production of an alleged "transactional file" and the Arbitrator's determination that evidence regarding Hawthorn Mellody was irrelevant, none of these evidentiary issues provides any basis for granting the writ of certiorari herein. (page (i)). These evidentiary matters were properly ruled upon by the Arbitrator and considered by the courts below, and do not constitute an appropriate basis upon which to grant the writ sought.

> concluding that Fuqua did not spinoff Interstate with a principal purpose to evade or avoid withdrawal liability under the MPPAA.

(page 17a).

After the Fund appealed the District Court's judgment, the United States Court of Appeals for the Third Circuit affirmed the judgment of the District Court by judgment order. A petition for panel rehearing was denied on December 3, 1992.

REASONS WHY THE PETITION SHOULD BE DENIED

BECAUSE THE ARBITRATOR FOUND THAT NO EVIDENCE SUPPORTS THE FUND'S CONTENTION THAT FUQUA SPUN OFF INTERSTATE TO EVADE OR AVOID WITHDRAWAL LIABILITY, NO ISSUE ARISES IN THIS ACTION CONCERNING THE CONSTITUTIONALITY OF THE REBUTTABLE PRESUMPTION THAT THE FUND WAS INITIALLY CORRECT IN DETERMINING THAT FUQUA WAS LIABLE FOR THE ALLEGED WITHDRAWAL UNDER 29 U.S.C. § 1401(a)(3)(A)

The Arbitrator, in determining "[t]he sole and narrow question for decision in this case" (page 44a), *i.e.*, whether Fuqua spun off Interstate with a principal purpose to evade or avoid withdrawal liability in violation of 29 U.S.C. § 1392(c), expressly decided as a preliminary matter that both parties in reality bore "the burden of producing evidence to support their versions of the facts at issue" and "to persuade the arbitrator concerning the ultimate truth of the facts at issue." (page 79a). Thus, by this *de facto* allocation of the parties' respective burdens, the Arbitrator gave ample opportunity for each party to persuade the fact finder of the merits of its case.

Although the Fund urges the Court to grant certiorari on the grounds that the Arbitrator erred in following established Third Circuit precedent and not giving the Fund the benefit of the rebuttable presumption that the Fund's initial determination that

Fuqua was liable to it for Interstate's withdrawal, and that "the effect of the presumption is central to the outcome" (page 14), the factual record and findings by the Arbitrator make it clear that, ultimately, the presumption is irrelevant to the determination of this action.

In the Award rejecting the Fund's claim against Fuqua, the Arbitrator expressly found, after hearing and considering all of the evidence presented by the Fund and Fuqua, that

> [t]he record is devoid of either substantive or inferential evidence that 'a principal purpose [of the Interstate spinoff] was to evade or avoid withdrawal liability.' Rather, the evidence supports the conclusion that Fuqua made a calculated financial decision to do with Interstate what was deemed best for Fuqua: spin it off. It had many advantages for Fuqua and the fewest drawbacks of the alternatives.
>
> * * * *
>
> There has been no evidence presented that withdrawal liability or even the pension obligations of Interstate were ever considered to be a factor in the spinoff decision.

(pages 59a - 60a). This factual determination was made by the Arbitrator after hearing the testimony of former Fuqua officers (who were directly involved in making the spinoff decision) that the concept of withdrawal liability was not discussed, considered or even known by the management of Fuqua before the spinoff of Interstate, and after reviewing the documentary record and transcripts of depositions of other former Fuqua officers who were also involved in making the spinoff decision. Based upon this record, the Arbitrator further held that there was not "a bit of evidence" to discredit the sworn testimony of the Fuqua witnesses (page 50a) and that "[t]here is *not a single reference* to be found in any [documents introduced by the parties] that pertains to withdrawal liability." (emphasis in original) (page 51a).

In other words, this is not a close case in which the application of the presumption urged by the Fund, and the sole basis upon which the Fund bases its Petition, made any difference to the outcome.[3] The Fund's theory that Fuqua had a principal purpose to evade or avoid withdrawal liability was exposed at the hearing to be unsupported by any facts whatsoever while, on the other hand, the evidence presented by Fuqua was found by the Arbitrator to be sufficient to carry its burden of "persuad[ing] the arbitrator concerning the ultimate truth of the facts at issue." (page 79a). Thus, even assuming *arguendo* that, as urged by the Fund, the holding of the Third Circuit in *Yahn & McDonnell* is wrong, and assuming further that the Fund is entitled to the benefit of a rebuttable presumption favoring the Fund's initial determination of liability, the factual record and holdings by the Arbitrator below establish that Fuqua proved the Fund's claims to be without factual basis and thereby eradicated any benefit the Fund might claim from the invocation of the statutory rebuttable presumption.[4]

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[3] Petitioners' reliance upon an analogy to the presumption of correctness of determinations of the Commissioner of Internal Revenue is fatally flawed. Courts "need not give effect to the presumption . . . if the Commissioner cannot present some predicate evidence supporting its determination." *Portillo v. Comm'r*, 932 F.2d 1128, 1133 (5th Cir. 1991). To the contrary, "[t]he tax collector's presumption of correctness has a herculean muscularity of Goliathlike reach, but we strike an Achilles' heel when we find no muscles, no tendons, no ligaments of fact." *Id.* (quoting *Carson v. United States*, 560 F.2d 693, 696 (5th Cir. 1977)). Likewise, the factual finding by the Arbitrator that there was no evidence to support the Fund's determination herein, together with the holding that Fuqua carried its burden of persuading the Arbitrator that it had no intent to evade or avoid withdrawal liability, makes irrelevant the constitutional and statutory issues raised in the Fund's Petition.

[4] Because the Arbitrator, after hearing all of the evidence, expressly found as a matter of fact a total lack of any evidence of an intention by Fuqua to evade or avoid withdrawal liability, the outcome of this action is not dependent in whole or in part upon the decision of the Court in *Concrete Pipe and Products of California, Inc. v.*

(continued...)

CONCLUSION

It is submitted for all of the reasons set forth herein that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[4](...continued)
Construction Laborers Pension Trust Fund for Southern California, No. 91-904.